UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID L. WHITE, JR., Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DC07528910476 DATE: SEP 18 1990

Frederic Schwartz, Jr., Esquire, Washington, D.C., for the appellant.

Lt. Col. Paul G. Thompson, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision, issued December 7, 1989, that sustained his removal. For the reasons discussed below, we GRANT the petition under 5 U.S.C. § 7701(e), and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

The agency removed the appellant from the position of Motor Vehicle Operator, WG-7, at the Walter Reed Army Medical

Center, on August 11, 1989. The agency based the removal on the appellant's inability to perform the full range of required duties of his position. *See* Agency File, Tabs 1 and 2.

The appellant filed a petition for appeal of the removal with the Board's Washington Regional Office. During the processing of the appeal, the parties stipulated that the appellant could not physically perform the duties of a Motor Vehicle Operator, WG-7. Thus, the issue to be decided was whether the agency discriminated against the appellant on the basis of a handicapping condition in removing him. *See* Initial Appeal File (IAF), Tab 7. The appellant thereafter waived his right to a hearing on his appeal. *See* IAF, Tab 13. Consequently, the administrative judge issued an order dated November 2, 1989, stating that the record would close on November 9, 1989. *See* IAF, Tab 14.

The appellant's final submission to the Board consisted of a document dated November 10, 1989, and a motion to delay the closing of the record by 1 day. *See* IAF, Tab 15. The agency then submitted a motion to extend its time to file a response to the appellant's submission until November 17, 1989. It stated that the agency's representative did not receive either the Board's Order closing the record or a copy of the appellant's brief until November 14, 1989. *See* IAF, Tab 16. The agency made its final submission to the Board on November 18, 1989. It included a brief and a memorandum from the deciding official, Robert E. Burton, which responded

specifically to assertions made by the appellant in his final submission. Both documents were dated November 17, 1989. *See* IAF, Tab 17.

An administrative judge with the Board's Washington Regional Office sustained the agency's action. She noted that the Motor Vehicle Operator position description required the appellant to drive a variety of vehicles, including gasoline or diesel powered vehicles, sedans, vans, buses, and patient transport vehicles, and to assist with loading and unloading the vehicles. She found that the appellant suffered from knee and shoulder injuries, and that the agency had attempted to accommodate the appellant's condition, but that further limitations placed on the appellant prevented him from driving any vehicle other than an automobile, from driving a small car, and from taking trips of longer than 50 minutes.

The administrative judge acknowledged the appellant's claim that even though he could not perform the duties of the Motor Vehicle Operator position, he could perform its essential functions with reasonable accommodation, specifically, he could distribute the mail twice a day and be available to drive a standard automobile on trips of less than 50 minutes. She found, however, that the position could not be restructured to provide the accommodation required. Citing Mr. Burton's statement as support, she found that to create a new position including two short distribution runs and no duties other than being a standby for short trips in a large car was not a reasonable accommodation. Because these duties

would not fill an 8-hour day, it would be necessary to include additional duties, none of which the appellant could perform.

The administrative judge also considered the possibility of reassigning the appellant to another existing or restructured position. She noted that the appellant identified two vacant positions, Motor Vehicle Operator (Dispatcher), WG-6, and Computer Operator, GS-7, which he believed he could perform if they were restructured. Concerning the first, however, the administrative judge found that the agency determined that the appellant could not perform the motor vehicle operator duties of the position which the agency deemed to be a necessary part of the position. In doing so, she again cited Mr. Burton's statement. The administrative judge determined that the agency considered restructuring the position and found that it would constitute a burden to provide a position with almost no duties.

Concerning the computer operator position, the administrative judge found that the agency was not required to promote the appellant to a higher-graded position in order to accommodate his handicap. In addition, she found that the appellant would be unable to perform the duties of this position because the computers required a cool environment and the appellant had admitted that any forced air conditioning aggravated his condition.

The administrative judge concluded that the appellant failed to show handicap discrimination. She found that he

stipulated that he could not perform the duties of his position and did not articulate a reasonable accommodation by which he would be enabled to perform in his position or in a vacancy to which he could be reassigned. Thus, she found that he was not a qualified handicapped employee entitled to accommodation.

ANALYSIS

In his petition for review, the appellant contends that he telephoned the administrative judge after receiving the agency's last submission to advise her that he wished to respond to the submission. He asserts that the administrative judge denied his request. We note that the administrative judge did not document her actions with regard to the agency's and the appellant's motions for extensions of time. As indicated above, however, it is clear that the administrative judge considered the appellant's and the agency's untimely submissions in rendering her initial decision.

Under the circumstances of this case, we find that it was error for the administrative judge not to allow the appellant to respond to the agency's final submission. Determining when to close the record is a matter within the sound discretion of the administrative judge. However, where an appeal is decided without a hearing, the procedures used must comport with the basic requirements of fairness and notice, including an opportunity to respond to submissions of the parties. *See, e.g., Schmidt v. United States Postal Service*, 39 M.S.P.R.

188, 193 (1988); *Anastos v. United States Postal Service*, 38 M.S.P.R. 18, 21 (1988); *Schultz v. Consumer Products Safety Commission*, 10 M.S.P.R. 104, 106 (1982).

Here, as previously stated, the agency requested an extension of time until November 17, 1989, which the administrative judge apparently granted, and made its final submission on November 18, 1989. *See* IAF, Tabs 16 and 17. The administrative judge cited the statement of Mr. Burton, which was contained in this submission, in deciding that the agency could not restructure the Motor Vehicle Operator position or the Motor Vehicle Operator (Dispatcher) position to accommodate the appellant. *See* I.D. at 4-6. Because of the timing of the agency's submission, the appellant could not respond to these points before the close of the record. In addition, the statements made by Mr. Burton involved issues that were material to the disposition of the appellant's appeal. Thus, we find that the appellant should have been granted an opportunity to respond to the agency's submission. *See, e.g., Schmidt*, 39 M.S.P.R. at 191, 194; *Anastos*, 38 M.S.P.R. at 20-21; *Schultz*, 10 M.S.P.R. at 105-06.

We find, however, that the administrative judge's error did not adversely affect the appellant's substantive rights. We have considered the appellant's arguments in response to the agency's final submission, and find that they constitute mere disagreement with Mr. Burton's statements and the administrative judge's conclusions that the appellant failed to meet his burden of proof on the issue of handicap

discrimination. Thus, they provide no basis for reversing the initial decision. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). Moreover, we note that the appellant has neither requested that the appeal be remanded for further consideration by the administrative judge nor shown why such action would be necessary.

In his petition, the appellant contends that the administrative judge erred in finding that the agency could not reasonably accommodate him by restructuring the Motor Vehicle Operator position. In this regard, he asserts that the agency did not show that mail distribution normally involved lifting and carrying heavy items, and in any event, that his latest medical reports placed no restrictions on his lifting or carrying.

The position description for the Motor Vehicle Operator, however, provided for frequent handling of objects weighing up to 20 pounds and occasional handling of objects weighing over 50 pounds. *See* Agency File, Tab 10. As the appellant admits, the April 5, 1989 report from Dr. Owen C. Dillon stated that the appellant's condition is aggravated by lifting and carrying. *See* Agency File, Tab 12(i). Although it is true that subsequent medical reports do not specifically mention restrictions on the appellant's lifting and carrying, they do not support the appellant's assertion that the restrictions have been removed. The documents, several of which are brief

notes, generally either stated that the appellant should engage in "no duty" or recommended that the appellant be given "desk-type" activities. *See* Agency File, Tabs 12(a), (b), (d), (e), (g), and (h). A restriction on lifting and carrying is subsumed in these recommendations. Another medical report was simply an evaluation of the appellant's knee condition. *See* Agency File, Tab 12(c). Finally, Dr. Dillon's report stated that the appellant's shoulder condition was permanent. *See* Agency File, Tab 12(i). Thus, the appellant has shown no error in the administrative judge's conclusion that he could not perform the lifting and carrying functions of a restructured position.

The appellant also asserts that the administrative judge erred in accepting the agency's statement that sometimes only a smaller vehicle was available for mail distribution. The appellant, however, has failed to offer any evidence to support his assertion of error. Mere disagreement with the administrative judge's findings does not warrant full review of the record by the Board. *See Weaver*, 2 M.S.P.R. at 133-34. Concerning the 50-minute restriction, the appellant contends that it did not preclude him from taking trips of more than 50 minutes, but from driving for more than 50 minutes at a time. He asserts that a reasonable accommodation would be to allow him to drive for 50 minutes or less to a destination and then to rest for a short time before returning to the agency. He contends that the record did not show that there were insufficient trips of this duration to fill an 8-hour day.

The record does not indicate that the appellant presented this interpretation of the 50-minute restriction before, and thus that it should be considered on review. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). In any event, even considering this interpretation, the appellant has still shown no error in the administrative judge's findings that he could not perform the position because of the restrictions on his carrying and lifting and on the type of vehicles he could drive. Moreover, he has presented no evidence to show that there would be sufficient trips to fill an 8-hour day, or to establish error in Mr. Burton's statement that there was not enough driving of sedans or vans to keep a driver occupied for more than 4 hours a day. *See* IAF, Tab 17. Again, mere disagreement with the administrative judge's findings does not provide a basis for Board review. *See Weaver*, 2 M.S.P.R. at 133-34.

The appellant also contends that the administrative judge erred in finding that he could not be accommodated in another position. He asserts that the agency did not consider restructuring vacant positions other than those he identified. The record shows, however, that the agency considered the appellant for numerous vacancies. *See* Agency File, Tab 6; IAF, Tab 9. An agency need not consider reassignment to vacant positions "ad infinitum" or create a position where none exists. *See Patrick v. Department of the Air Force*, 39 M.S.P.R. 392, 396 (1988). Rather, the agency must consider whether vacant positions identified by the appellant can be

restructured to accommodate his handicap. *See McLean v. Department of the Army*, 36 M.S.P.R. 405, 408 (1988).

Concerning the identified positions, the appellant asserts that the record does not show how often a Motor Vehicle Operator Dispatcher would be required to aid in loading or unloading a vehicle or to engage in "non-dispatch" functions. The position description for this position makes clear, however, that the Dispatcher is required to drive vehicles and to handle heavy objects. *See* IAF, Tab 15, Exhibit B. Moreover, Mr. Burton stated that all people in the motor pool, including the dispatchers, are required to drive. *See* IAF, Tab 17. The appellant is simply disagreeing with the administrative judge's conclusions on this issue without offering any proof to the contrary.

Finally, the appellant asserts that the administrative judge erred in finding that placing him in the Computer Operator, GS-7, position would not constitute a reasonable accommodation. Despite the appellant's attempt to distinguish *Clopton v. Department of the Navy*, 36 M.S.P.R. 373 (1988), by contending that it involved a non-professional worker who sought a promotion to a professional position, the administrative judge correctly relied on *Clopton* in finding that the agency was not required to promote the appellant to a higher-graded position. *Id.* at 378-79.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
1801 L Street, N.W., Suite 5000
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after

receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.